not compellable in equity to do so, the true requirements of mutuality have been satisfied so as to entitle him to specific performance.[15] Substantial,[16] and by some courts even part performance,[17] has also been held sufficient. Though perhaps technically incorrect, it is equitable that substantial performance should be enough; but mere part performance should never suffice, since the defendant is not given or assured his equivalent. And the better authority supports this view.[18] In a recent case the plaintiff, having performed for three years his agreement to work certain lots continuously for an eight-year term, was allowed specific performance of the defendant's oral [19] promise to lease the property for that period. *Zelleken* v. *Lynch*, 104 Pac. Rep. 563 (Kansas). The defendant's objection of lack of mutuality was rightly overruled by the court, not because of the part performance, but, as in the negative contract cases, because of the court's ability to assure to the defendant his *quid pro quo* by the form of its decree. For the written lease ordered should rightly contain a clause of reëntry for breach of the covenant to mine continuously, and thus make the defendant's obligation conditional upon the plaintiff's continued performance.

WHO MAY BE A PETITIONING CREDITOR IN BANKRUPTCY. — The right to institute involuntary proceedings in bankruptcy is vested by the Act of 1898 in "creditors who have provable claims." [1] Since a proper petition is necessary to give jurisdiction,[2] the judicial construction of these words is of the first importance. The courts seem generally to give more weight to the intent of the Act to furnish an equitable distribution of a debtor's property among his creditors, than to its literal language.[3] Thus certain provable claims will not qualify any creditor to petition, while the right of a creditor to petition, who has assented to assignments, or is a preferred creditor, is restricted or denied. Although the statute in terms includes all provable claims, the right of the petitioning creditor must have existed as a provable claim at the date of the act of bankruptcy.[4] This excludes

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[15] Boyd *v.* Brown, 47 W. Va. 238; Lane *v.* M. & T. Hardware Co., 121 Ala. 296 (Performance of promise to erect buildings); Topeka Water-Supply Co. *v.* Root, 56 Kans. 187 (Performance of promise to render services); Dresel *v.* Jordan, 104 Mass. 407 (Acquisition of title since time of bargain). For this reason the doctrine of mutuality is inapplicable to unilateral contracts. Howe *v.* Watson, 179 Mass. 30; Spires *v.* Urbohn, 124 Cal. 110.

[16] Howard *v.* Throckmorton, 48 Cal. 482; Thurber *v.* Meves, 119 Cal. 35. *Cf.* Welch *v.* Whelpley, 62 Mich. 15 (Unilateral contract).

[17] University of Des Moines *v.* Polk County H. & J. Co., 87 Ia. 36; Minn. & St. Louis Ry. Co. *v.* Cox, 76 Ia. 306.

[18] Cooper *v.* Pena, 21 Cal. 403; Ikerd *v.* Beavers, 106 Ind. 483; Bourget *v.* Monroe, 58 Mich. 563.

[19] Possession taken by the plaintiff, supplemented by improvements, was sufficient part performance according to the law of the jurisdiction to take the case out of the Statute of Frauds. Bard. *v.* Elston, 31 Kans. 274.

[1] § 59 b.

[2] *Re* Burlington Malting Co., 109 Fed. 777. The sufficiency of the petition is determined as of the date of adjudication. *Re* Mammouth Pine Lumber Co., 109 Fed. 308.

[3] *Re* J. M. Mertens & Co., 147 Fed. 177, 180.

[4] Beers *v.* Hanlin, 99 Fed. 695.

debts created,[5] or tort claims liquidated after that date,[6] but not an unliquidated claim for a prior breach of contract.[7] But it is unnecessary that the petitioner should himself have owned the claim at the date of the act of bankruptcy, for an assignee will succeed to his assignor's rights in this respect.[8] A recent decision holds, however, that a creditor cannot avoid the requirement of three or more petitioning creditors [9] by assigning parts of his claim to separate persons for the express purpose of qualifying them as petitioning creditors. *In re Lewis F. Perry & Whitney Co.*, 172 Fed. 745 (Dist. Ct., D. Mass.). In the same proceedings the court also decides that a stranger purchasing a claim against the debtor after the filing of the petition, for the express purpose of joining in the petition, will not be allowed to do so.[10] The objection to both schemes is based upon the spirit and policy of the Act rather than upon its express language: it can hardly be said that the protection of such creditors is within the purview of bankruptcy legislation.[11]

A creditor who, with full knowledge of the facts, has consented to an assignment for the benefit of creditors is generally held not to be a good petitioning creditor. This is put either on the ground of an accord and satisfaction of the creditor's claim,[12] or on the broad principle of an election of one of two inconsistent remedies.[13] Whether his consent to the assignment bars the creditor from petitioning on an act of bankruptcy distinct from the assignment is not clear. On the reasoning of the cases cited it should bar him, either *pro tanto*, if the first line of reasoning is adopted, or wholly, according to the second.[14] But if consent to the assignment was obtained by fraud, or given in ignorance of material facts, it is no bar to a petition alleging the assignment as an act of bankruptcy.[15]

The decisions are also in conflict as to the terms upon which a simple preferred creditor may petition upon his unsatisfied claim. The Act provides that his claim "shall not be allowed unless" he surrenders his preference.[16] And although some cases have construed this to prevent him from petitioning unless he surrenders,[17] the policy and language of the statute

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[5] See *Re* Callison, 130 Fed. 987, 988. See under the Act of 1867, *Re* Muller, Fed. Cas. 9, 912.

[6] *Re* Brinckmann, 103 Fed. 65.

[7] Frederick L. Grant Shoe Co. *v.* W. M. Laird Co., 212 U. S. 445.

[8] *Ex parte* Thomas, 1 Atk. 126.

[9] Namely, where the total number of creditors exceeds twelve. See § 59 b.

[10] *Re* Lewis F. Perry & Whitney Co., 172 Fed. 752.

[11] Lowenstein *v.* Henry McShane Mfg. Co., 130 Fed. 1007. *Cf. Ex parte* Harper, 20 Ch. D. 685; *Re* Baker, 5 Morr. Bankr. Cas. 5. *Contra*, *Re* Bevins, 165 Fed. 434.

[12] *Re* Romanow, 92 Fed. 510. *Cf.* Good *v.* Cheesman, 2 B. & Ad. 328; *Re* Miner, 104 Fed. 520.

[13] Moulton *v.* Coburn, 131 Fed. 201, 203. *Cf.* Lowenstein *v.* Henry McShane Mfg. Co., *supra*.

[14] But see Salmon *v.* Salmon, 143 Fed. 395, 405. Creditors who assent to a general assignment would seem also to fall under § 57 g. See note 16, *infra*, and *Re* Gutwillig, 92 Fed. 337.

[15] Canner *v.* Webster Tapper Co., 168 Fed. 519. See *Re* Curtis, 94 Fed. 630.

[16] Under the amendment of 1903 the prohibition of § 57 g applies to "creditors who have received preferences voidable under section sixty, subdivision b, or to whom . . . transfers, . . . or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made. . . . " The effect of this provision on the right to petition has thus far been considered only as to preferred creditors.

[17] *Re* Fishblate Clothing Co., 125 Fed. 986.

would seem satisfied by requiring a surrender of the preference as a condition to adjudication, but not to the right to petition;[18] for a distinction is apparently taken in both the present statute and that of 1867, between the *proof, i. e.*, the filing of a claim provable under § 63, and its *allowance.*[19]

RUNNING OF THE BURDEN OF COVENANTS WITH THE LAND AT LAW. — Where the burden of a covenant runs with the land and there is no contractual relation between the parties, they are bound, it is said, by "privity of estate." Just what constitutes privity of estate when both parties have not estates in the land, that is, when the relation of landlord and tenant does not exist, is a difficult question, owing to the confused state of the authorities.

Whatever may have been the early law,[1] the present general doctrine in England is, that privity of estate exists only where there is the relation of landlord and tenant.[2] If, however, the covenant can be construed as a grant of an easement or profit, the burden of the right so created will run.[3] Furthermore, the burden of a covenant to pay for damages incidentally caused by exercising a profit has been, in effect, allowed to run, on the theory that the substance of the right granted was to take, but pay.[4] In three jurisdictions in this country, the doctrine may be as closely limited as in England;[5] but most states, starting with the rule that an easement may be created by an instrument sounding in covenant,[6] have readily advanced to the position that further covenants in support of such an easement, which cannot from their subject matter constitute additional easements, bind the owner of the servient tenement.[7] So, the general rule in this country is that, in the absence of the relation of landlord and tenant, there is privity of estate if the interest of one party in the other's land is

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[18] *Re* Horntstein, 122 Fed. 266. *Cf.* Frederic L. Grant Shoe Co. *v.* W. M. Laird Co., 212 U. S. 445, 448.

[19] Under the Act of 1867, (14 Stat. at L. 517), see §§ 22, 23, 27, 29, 30, 33, 34. Under the Act of 1898 see §§ 57, 63. See also, in the English Bankruptcy Act (46 & 47 Vict. c. 52), Schedule II, § 22.

[1] See SIMS, COVENANTS, 58, 62.

[2] Haywood *v.* Brunswick, etc. Society, 8 Q. B. D. 403.

[3] Rowbotham *v.* Wilson, 8 H. L. C. 348.

[4] Aspden *v.* Seddon, 1 Ex. D. 496. A result like the running of the burden of a covenant to pay for a part of a party wall on using it, has been reached on an unsatisfactory theory of implied contract. Irving *v.* Turnbull, [1900] 2 Q. B. 129.

[5] Pittsburgh, C. & St. L. Ry. Co. *v.* Bosworth, 46 Oh. St. 81, but *cf.* Hickey *v.* Railway Company, 51 Oh. St. 40. See Tardy *v.* Creasy, 81 Va. 553; Brewer *v.* Marshall & Cheeseman, 19 N. J. Eq. 537. The actual decisions of the last two cases are not incompatible with the burden's running more freely. *Cf.* Costigan *v.* Pennsylvania R. R. Co., 54 N. J. L. 233.

[6] Conduitt *v.* Ross, 102 Ind. 166; Weill *v.* Baldwin, 64 Cal. 476.

[7] Fitch *v.* Johnson, 104 Ill. 111; Nye *v.* Hoyle, 120 N. Y. 195. The same result has been reached with covenants in aid of a profit. Morse *v.* Aldrich, 19 Pick. (Mass.) 449; Crawford *v.* Witherbee, 77 Wis. 419. Or a rent charge. Herbaugh *v.* Zentmyer, 2 Rawle (Pa.) 159; Van Rensselaer *v.* Hays, 19 N. Y. 68. But an equitable lien on the land, other than a mortgagor's interest (Barron *v.* Whiteside, 89 Md. 448), does not constitute privity of estate. Edwards *v.* Meader, 11 N. Y. Supp. 285; Fresno Land Co. *v.* Rowell, 80 Cal. 530.